



Institutional Models for a Future Recognition and Registration of Customary (Communal) Tenure in Myanmar

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**Paper prepared for presentation at the
“2016 WORLD BANK CONFERENCE ON LAND AND POVERTY”
The World Bank - Washington DC, March 14-18, 2016**

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Abstract

In Myanmar land issues are of paramount importance after years of land grabbing by the military and business cronies. A rapid anthropological study 2013-14 in Chin and Shan State for the Land Core Group was carried out to inform the post 2011 government. The study recorded the internal rules of customary communal tenure and identified possible statutory means of protecting untitled land, including fallows, against alienation. The Land Core Group guided the Government Committee during 2014-15 to recognize customary tenure in drafting of the National Land Use Policy, not yet endorsed. The study recommended conversion of the community into a legal entity/organization registering all its agricultural land, while keeping separate and intact its customary internal rules. The study construed a reading of existing regulatory framework in support. The study proved, though, that precise mapping of large tracts of shifting cultivation land is difficult due to annual diversity of fuzzy boundaries.

Key Words: land rights, communal tenure, mapping, land registration, indigenous peoples

Background of the Study on Customary Tenure in Chin and Shan States, Myanmar

The paper is based on research carried out in 2013-14 by an international anthropologist engaged and supported by the Land Core Group (LCG) in Myanmar, a conglomeration of national and international NGOs. It was carried out in Northern Chin and Northern Shan States, where two villages in each state - out of several visited - were interested to participate in a pilot research project on procedures to protect their land claims through evidence-based recommendations to the government on how to register customary tenure. None of the villages had any land titles.

The focus was to provide data, which would encourage the Government of Myanmar to recognize the land rights of upland communities. The relevance of the topic was grounded in a wish to 1) identify statutory means to protect the livelihood of ethnic upland communities in Myanmar from losing, in particular, their shifting cultivation fallow land to agribusiness concessions; 2) based on results from fieldwork, to guide the Government towards recognizing customary (communal) tenure in the drafting of the National Land Use Policy (NLUP) with the ultimate aim of recommending procedures for customary (communal) land registration in a future new Land Law and associated Rules 3); to define how to recognize boundaries of shifting cultivation parcels in a customary system of fair but variable annual local land sharing.

The research used elements of the Theory of Common Property developed by the late Elinor Ostrom (1990) to draft scoping questions that would reveal the characteristics of existing customary communal tenure, i.e. questions of physical and social boundaries (spatial boundaries and effective exclusion of external un-entitled parties), internal customary rules for sharing the land, i.e. the collective appropriation and provision of the common property agricultural resources adapted to local ecological conditions and the collective-choice arrangements that would allow resource appropriators to participate in the decision-making process (establishing the village as a legal entity or legal individual based on its own statutes which define its governance structure and right-holders).

The selection of the two states that were different in landscape, ecology, resource endowment, and kinship systems added to our understanding of the variation in how environment/ecology and human adaptation is linked, in this case through examples of tenure and land management. Village territories with shifting cultivation of subsistence crops (e.g. millet and sulphur beans) in Chin State commanded up to 12 - 15,000 acres of farmed and fallow land that were held communally by the village and located at a high elevation of + - 2000m, while the village territories for agricultural land use in the Shan state were much lower-lying and commanded only around 1000 - 1400 acres that were subject to more permanent

and privately claimed agricultural land use that included cash crops such as corn along with rainfed and irrigated rice for subsistence.

The approach of the research focused on agricultural land, including the fallows of shifting cultivation, only. It did not cover the forest areas inside the village territory, which were also considered village common property. While these forests may also be considered the common property of the village and in the overall landscape not be distinguished by villagers from the agricultural land fallows, they cannot immediately be included in a future statutory customary land title for shifting cultivation land and other permanently used agricultural land as the forest is under the control of the Ministry of Environmental Conservation and Forestry (MOECF) and the agricultural land under the Ministry of Agriculture and Irrigation (MOAI). Different pieces of legislation apply to forest versus agricultural land and the research aimed to use or construe the existing legislation on so-called farmland to support the objectives. The research took place in short periods in 2013-14 when the government's new regulatory framework in the form of the Farmland Law, 2012 and the Association Law, 2014 were the means which could be construed to support the establishment of procedures to protect and register customary land tenure.

In addition to these laws, during the second half of 2014 and during 2015 seven draft versions of a new National Land Use Policy were developed and sent for public consultation and while this is not a law, by 2015 the text of the policy supports the objectives of the research. The latest version by end of 2015 mentions the term "customary tenure" twelve times with an assurance of protection and registration. This is no doubt one of the results of the research in which the LCG has been very active and constructive in the consultations with the drafting committee in the capital Naypyitaw during end 2014 and 2015. So recognition and registration of customary tenure is now part of the National Land Use Policy. However, the policy does not specify procedures, which means that there will still be a lot of work for the LCG to support and monitor regarding how these good intentions are reflected in the future Land Law and in the Rules under the Law.

The second objective of the research to outline possible statutory means for the institutional arrangements has also been met in the research, but not finalized, as more discussions with local communities are needed and comments from the government have not yet been solicited. The suggestions still need, therefore, as said, a good deal of fine tuning. The main problem is the third objective of defining the physical boundaries of customary tenure, where this customary tenure applies to shifting cultivation, as the physical boundaries oscillate year by year and may not be exactly the same, when a ten year old fallow is opened up again.

The Political Economy of Land Grabbing

The Than Shwe military regime, which was in power until the gradual reform process started in 2012, relied on the army or *tatmadaw* for law and order and self-enrichment through repression. The *tatmadaw* was at liberty to take farmers' land, which was never formally titled, without any compensation. With the start of the reform process in 2012 a Land Use and Land Allocation Scrutiny Committee (LULASC) was set up in 2013 by the new president, Thein Sein. This LULASC was meant to hear grievances from the farmers of Myanmar and ensure that land was given back. However, the army has only reluctantly released appropriated land and if released via local authorities it has frequently been sold by the same corrupt officials to private businesses rather than given back to the original possessors. In December 2014 a number of politicians demanded resolution of land disputes before next election in November 2015. Thura Shwe Mann, speaker of the Union Parliament of the Lower House of Parliament then said that if the current government and parliament failed to address the much-criticized farmland issues during the remaining presidential and parliamentary tenure, they will certainly face widespread condemnation.

Figure 1: Shan farmers voice their grievances, 2016

Grabbing of any untitled land, in particular land lying fallow, which is vacant in the eyes of the Ministry of Agriculture and Irrigation (MOAI), is a risk that communities nowadays counter primarily through protests as they have few legal means. As the reform process started, numerous protests emerged all over Myanmar. Some farmers demonstrated in processions, others used Gandhian means of reclaiming the village land by ploughing it.

Figure 2: Villagers claiming land by ploughing it

Besides losing land to the army's practice of land grabbing, we find concessions by MOAI to agribusiness development. Two land laws were adopted in 2012: besides the Farmland Law there is the Vacant, Fallow and Virgin Land Law (VFV Law) 2012. The former for the first time allows private land titling to be provided to farmers - and organizations as well. The latter is aimed at agribusiness and, as the name indicates, allows acquisition of land that looks vacant and fallow, including the fallows of upland communities.

The MOAI *Master Plan for the Agricultural Sector 2000-2030* promises to convert 10 million acres of "wastelands" for agricultural production. By May 2013, based on official statistics, a total of 377 domestic companies had been allocated 2.3 million acres of 'vacant, fallow, and virgin land' and 822

companies or individuals have been allocated a total of 0.8 million acres of forest land. MOAI data indicate that the land under VFV Law concessions increased by at least 0.3 million acres.

By far the largest tracts of land have been allocated to rubber, oil palm, rice, and jatropha, followed by rice, sugarcane, and cassava. In a working paper for Michigan State University it was noted that “Given ongoing granting of concessions, a major priority is to protect the land rights of traditional land users operating under customary tenure in extensive long fallow farming systems” (Derek Byerlee, Dolly Kyaw, U San Thein and L. Seng Kham: 2014).

This loss of land has been the background for several studies by the LCG and the reason for the LCG to ask the present author to undertake a study of customary (communal) tenure and help define ways that land under such tenure could be subject to protection, including through land registration. This would help counteract contested access.

The History of Customary Tenure in Myanmar

Lands used by farmers both in the lowlands and uplands have for generations been under management rules recognized by the local communities. The management is adapted to the ecological characteristics of the landscape and its resources, to the kinship systems, to population density and to the actual history of the area and settlement. Customary tenure is grounded in community-based rights of access, which derive their legitimacy and authority from the community as a whole and its leaders. Customary tenure maximizes net social welfare within the community. Close-knit communities can work jointly to combat encroachment by outsiders much better than an individual family. Households only claimed private ownership to the crops they grew in any particular year or perennial garden crops. A British officer in Burma, J.S. Furnivall, who coined the concept of ‘plural society’, wrote in 1920 in his paper *Land as a free Gift of Nature* that: “the characteristics, therefore, of the tenure in Pegu were a temporary appropriation of the land during the period of occupation only; when done with it was restored to the community, like the atmosphere we breathe, changed, but after renovation in the usual course of nature, open to further use. The occupation was for the most part *restricted to the people who lived near it*”¹.

Throughout history, customary land tenure systems of S. E. Asia have seen the community and its lands spiritually linked to each other through the ancestors that cleared the land first - or wielded the

¹Italics inserted by author

machete - as the Burmese term *dama ucha* has it. These ancestors or ‘first founders of domain’ and their descendants were seen by their fellow villagers to be the ones that had established special relations to the spirits that granted the fertility of the land for the ones, who lived there (Lehman, 2003). In many S. E Asian upland communities ritual heads of such founders’ cults would receive ‘first fruits’ offerings for the spirits, when the harvest was done. In customary tenure the view of the community is that the relationship to the land is perpetual. However, by 2016, Chin ethnic communities in the uplands have long since converted to Christianity and the explanation today for why - in the eyes of villagers – still only those physically living in the village (previously under benevolent supervision of its spirits) can have access to a plot in the shifting cultivation landscape has lost its explicit reference to the spirits of the land being replaced by concern for children and grandchildren.

In the Northern Chin State around Hakha, where the research took place, each village located at 2000 m elevation is home to several patrilineal clans. Back in history the villages were frequently engaged in local warfare among themselves, while managing large blocks of mountain sides (*lopil*) in a rotational fallow system of shifting cultivation. Stevenson (1943:88) writes that there “is little doubt but that this system of working plots in one block made for far greater safety in the pre-annexation days of headhunting and slave-raiding.” In historic time local chiefs often invited kinsmen to come and stay in the village to add to its manpower as it was important for chiefs to fix manpower in their jurisdiction (Lehman, 2003:19). A remnant of this fact is that - in 2014 with no warfare – still the Chin would say that outsiders of Chin origin would be given shifting cultivation land, often good land, if they come to settle and live in the village.

In the Northern Chin State all land under shifting cultivation has traditionally been communal with private ownership limited to specific claims to certain ancestral plots on different mountainsides or *lopil*. These claims were held by high-ranking clans. If the claimant could not use the plots of land in the year the *lopil* was put for cultivation they were free for others to use. This was observed by the present author in 2014 as well as by the British officer Stevenson, living in the Northern Chin State in the 1930s. He lauded the Chin that this prevented “a person making a profit out of his land rights” (Stevenson, 1937:45). These specific ancestral plots were – and are also used today as ‘bride-price’ between clans at weddings. Stevenson (1943) clearly emphasized that any land plots privately owned (*bul ram*) are subject to rights of the community as a whole (Stevenson 1943: 78). The prerogative-holder was not permitted to refuse access for purposes of cultivation to any person wanting to use fields, if he himself was not using them (Stevenson 1943:90). Only a fraction of the common property of the village would have such ancestral prerogatives embedded.

The historical importance of sufficient manpower in the villages has also been confirmed for Shan State, when, for example, a hundred years ago a hereditary chief, a *sawbwa*, was too demanding and suddenly villagers left and moved elsewhere and left him exposed to the enemies (Lehman, 2003:19). If we go back centuries, it was not land, but manpower and labor that the various Southeast Asian kingdoms needed to maintain the upkeep and defense of the courts. We see how prisoners of war were transported back and forth between kingdoms (e.g. Burma, Siam and Lao), settled and forced to produce for the court (Scott, 2009:147).

Recording Customary Communal Tenure in Northern Chin State in 2014

In the Northern Chin State today the agricultural landscape of a village would be divided into, say, 18 *lopil* located at higher and lower elevations suitable for different kinds of subsistence crops. Each year (in a ten - twelve year rotation cycle) a Chin village will open one or two fallow rotating *lopil*. These *lopil* are traditionally divided into plots (*lo*) of around 3 acres by lines of stone. Everyone living in the village has a right in a ballot to receive a plot for farming each year. Families with ancestral claims in certain plots in a *lopil* that would be opened up that year may opt to use these plots, if they have enough labor. In the ballot some villages would put up only 80% of plots in order to tackle the situation of a large family with many dependents receiving a plot of limited fertility and size in the first ballot. Other villages adjust the selection of *lopil* and number of plots to the scale of village labor. In some years several young men in the village may travel to Mizoram, India for periodic jobs.

Figure 3: A *lopil* of 3-500 acres

The research took place in a number of villages around Hakha and ended up focusing on two of them. The initial recording of the customary internal rules of land management and land sharing took place with the help of a Chin interpreter. A number of scoping questions based on the Ostrom principles (the questions adapted to the characteristics of the environment, the natural resources and kinship system) was used to get started. The research used the author's experience of a similar recording of internal management rules in indigenous communities in Cambodia, which is a country that officially provides communal land registration for indigenous communities based on the Land Law of 2001.

The discussion of the customary internal rules of land use and land rights was based on drawing large sketch maps on flip charts with the villagers in village meetings.

Figure 4: Preparing sketch maps of land use and rights with villagers in Chin State

The main methodological constraint recording details of customary communal tenure in the Chin State was the lack of full opportunity (due to time and the translator's ability) to immediately dig deeper on the spot and ask 'the why' for each response. This is no doubt a universal problem in tenure studies in communities, where precision in language and translations require *a priori* good understanding of tenure concepts. However, with repetitions we were fairly successful and the drawing of maps together with villagers helped the understanding by digging into the different categories of land.

The internal management rules in the Northern Chin villages basically emphasized the annual ballot for distributing plots after a fallow period of approximately ten years; the injunction against an individual handing over permanently and for own benefit rights to an outsider; the injunction against encroaching on someone's plot already handed out in the ballot; inheritance rules; widows' rights and whether and not, for example, an individual could exploit particular resource niches in his temporary plot such as gravel and stones for sale for road construction or whether, for example, an outsider could exploit collection of bees' wax and finally, a new rule was thought out during the research, namely that if the village as a whole wanted to lease out a piece of land to an outsider, e.g. a company, there would be rules and all villagers would have to agree. Altogether the villages recorded around 25 internal customary rules.

An interview with a woman in Hakha town disclosed that she had left her village to work in Hakha town for a while. She still has rights to land in her village, when and if she returns. Right now, not being there, she does not have rights in land. She told that in the past, the village chief was not paid by the government, but held priority access to good fertile land, and may still get preferential treatment today. The lottery for sharing the land is fair, and if she returned to the village she might win a large plot that is fertile and would be able to share some of her asset with other families that year against some labor being provided to her. If a big family draws a lot of a smaller plot they can request to get more land. She emphasized that in the village there are no landless people, all have rights to land.

There is land she calls her father's ancestral land, but at present that land has been rented out by the village to support the local teacher. This signifies again the communal anchorage and overlay of anything ancestral and privately claimed. The teacher works for the community. This 'renting' means transferring rights for one year to a particular person in the village or neighboring village against remuneration that accrues communally to the village to use for the upkeep of the teacher, - not to her. After its use, the land is transferred back to the common property. If she goes back to stay in the village

she will get land again in the village's ballot system or the ancestral land, if free and part of the *lopil* that is opened up that year. She informed the researchers that some plots, like her own ancestral one can be 'rented out' also to families in neighboring villages for short terms, the payment for which goes into the village fund for entertainment of government officials or other guests of the village or, as mentioned, the school teacher. She informed the researchers that if newcomers arrive to settle in the village they are also given rights to land and are often given the most fertile land to make them more willing to stay.

The privately-claimed ancestral plots in the otherwise communal shifting cultivation land are thus clearly overlaid with communal rights just as Stevenson wrote for the 1930s. But nowadays the temporary and ancestral rights are also overlaid with 'investment of labor conversion rights' that allow another villager to acquire the right to turn pieces of land into a small permanent rice terrace or orchard that then becomes a permanent right. A fellow villager that has the money and labor to turn a suitable plot of land into a terrace or orchard can ask the village elders and the chief - as well as the 'owner', if it is an ancestral plot of land - paying a 'talking price' of beer and chicken. The request will be granted and the request for an ancestral plot will be honored too, if the 'owner' himself does not want to spend time, labor or money to convert the land into a terrace or orchard.

Figure 5: A terrace in a *lopil*

The establishment of terraces is gradually, but slowly gaining ground. A given village in the Northern Chin State may have 11-18 *lopil* and may command around 27,000 acres, but several thousand of these 27,000 acres would be stony and rocky, not suitable for cultivation. In reality, only 12 - 14,000 acres are used for shifting cultivation in a ten-year or longer rotation cycle. Out of these many acres in the pilot village a total of 80 acres had been turned into terraces by 2014. In other Northern Chin villages more land may have been turned into terraces as this is a development activity supported by local NGOs.

In the researchers' discussion with villagers and informing them about the Cambodian government's communal land registration of indigenous communities' land it became clear that the village wanted, if in the future it became possible, a cadastral communal land registration of all its shifting cultivation land, but eventually keeping the terraces and orchards out of the communal land registration. Based on this wish the research continued to examine how the community could be formalized into one legal entity that would own land in common. All the proprietary holders of the common property must be known and legally make up a group in whose name the land would be registered.

Recording Customary Tenure in the Northern Shan State in 2014

In contrast to Chin State the land endowment of the villages in Shan State is far less and the villages in Shan State, also in contrast to Chin State, have been subject to heavy land grabbing by the army and by MOAI's land concessions to the Chinese. A report by Global Witness (2015) *Guns, Cronies and Crops* highlights how the (till now) nationalistic USDP Party Minister of MOAI, Myint Hlaing (dethroned in the November 2015 election and stepping down by March 2016) grabbed large tracts of land in Northern Shan State, when he was a general there. The confiscations largely targeted hillside land, used by the villagers for shifting cultivation.

In the study area for this research near Lashio, the villagers had a major part of their land under permanent cultivation and therefore individuals held permanent claims in different blocks of land, none of which was titled. An initial assumption at the first visit in 2013 was that families in these villagers would want private land titling, which was made possible by the 2012 Farmland Law. However, also here, despite the privatized claims, it was observed that residence in the village is required by village rules for a family to use the land inside the village territory. One of the village customary internal rules stipulated that no one could sell even an irrigated paddy land parcel to an outsider but could – if need be – rent it out for a year or two. If this family wanted to leave the village, it could not sell the land. The land would go to a relative in the village or go back into a common pool for redistribution by elders and chief. Thus, also in the Shan State today, we find customary tenure defined by the resident – non-resident dichotomy while marking it as a partitioned common property of the village.

The villages visited in Shan State grew rice for subsistence and corn for sale (to China). The internal rules recorded in the Shan villages dealt with different aspects of land management and included more rules on borrowing and lending land than in Chin State. Land can be lent in a Shan village for free to relatives who live in the same village. If it is fallow land someone can ask permission and use it. However, if it is rented out to strangers (non-relatives) there must be an appropriate rental fee that the strangers need to pay. Such renting between villagers internally would require a contribution of 5000 Kyats (5 USD), which would go to the village development fund, which also supports the food costs of having government officials visiting the village. If an outsider, who is not resident, wants to rent land the rule is that the rental rate for one year per acre is 50,000 kyats (50 USD), but the outsider is allowed to rent for only one year, so no perennials, and at the same time it is necessary to pay 10,000 kyats (10 USD) to the village development fund. There must be a contract signed and witnessed by the elected village

land management committee (set up in accordance with the statutes developed during the research for legal incorporation of the village, see below). A copy of the contracts should be kept by land owner, borrower and the village land management committee.

The internal rules for inheritance in Shan villages stipulated - in contrast to Chin communities specifying patrilineal inheritance - that in Shan villages land would be provided equally to sons and daughters. However, if there were a son or daughter who looked after the parents, he or she could be given priority. The internal rules in Shan villages also dealt with the forest land in the village. They included fines such as if someone cuts trees from the village communal forest without permission, the penalty is that the person provides the village with 2 *kyins* (1 *kyin*= 10 ft x 10 ft x 1 ft) of gravel for village road rehabilitation.

As in Chin State the discussion with villagers relied on the simultaneous drawing of sketch maps of the village territory, the classes of land and the tenure.

The difference in internal rules in Chin and Shan State reflects cultural norms, history, kinship systems and, in particular, the characteristics of the terrain. It is clear that in Myanmar shifting cultivation land, which for a village comprises fairly large areas, is more amenable to communal tenure, with almost total absence of private claims except for ancestral prerogatives in certain plots that still, though, would be subject to communal rules and claims. Shifting cultivation is primarily for subsistence and given a terrain of steep mountains in many places, it is necessary for families, e.g. in Chin State, to work together in one and the same *lopil* when clearing and burning the debris. Shifting cultivation lands in the mountains often comprise large tracts of land. These large tracts would be subject to long fallows. In contrast, in areas where the customary tenure includes permanent claims the land is likely to be cultivated each year and the tracts of land inside the village territory are much smaller. Privatized claims with cash cropping and perennials are for the market and for subsistence. Such claims for cash crops and perennials need investment and individual, independent labor inputs, but the land claimed is still considered part of village land.

A characteristic for both Chin and Shan villages is the perception that the whole village territory consists of named landscapes. In Chin villages all the *lopil* had names, signifying whether at high or low elevation. The land in these *lopil* is, as mentioned, communal and the plots subject to lottery each year. In the Shan villages, the much smaller landscapes were similarly divided into blocks, but *a priori* 'owners' for each block were known. Thus, one Shan village had 21 named landscape blocks of different sizes (7 –

68 acres). Altogether the blocks used for upland agriculture in one of the Shan villages made up 848.5 acres, which can be compared with the more than 12,000 acres of shifting cultivation tracts in one of the Chin villages. One of the larger named blocks in a Shan village might have 54 owners, another 14 and a third only 3 owners. A person may have rights in several blocks. Altogether in this one Shan village there were 57 named right-holding families and no landless.

The discussion held in the Shan villages included telling about the customary systems in Chin State and the experience from Cambodia. This caused the Shan villages studied to emphasize that they would also want communal land registration, not individual land registration. This was also the conclusion in studies carried out by the researcher later (in the framework of another project) in the Southern part of the Shan State among villagers, who were in command of terraced paddy fields as well as large areas of shifting cultivation.

Development of Institutional Procedures for Customary Land Registration

One of the objectives of the research was to prepare recommendations to the Myanmar Government on possible procedures for registration of customary land in order to protect it against alienation. The focus was on the land of the upland so-called ‘ethnic nationalities’ as their lands often include fallow land that could be at risk of alienation – or even if not fallow, it might be taken. The risk was not only the army and MOAI’s concessions to agribusiness development under the VFV Law, but also the Ministry of Environmental Conservation and Forestry considering fallows as degraded forest suitable for investment in monocultural afforestation.

The procedures piloted in the two Chin and two Shan villages entailed, as explained above, the transcribing of the existing internal customary land management rules (oral rules). This was followed by a subsequent development of statutes that could help turn the village into a legal organization owning land. The formulation of statutes was seen as a step towards a legal incorporation of the community as *one* organization and right-holder of land title in accordance with Farmland Law Article 6 which allowed organizations to own land on a par with individual farmers. The organization would form a customized legal relationship and governance structures for all households which were members of the organization.

After recording the customary internal rules the researchers therefore came back with draft statutes on governance structures for further discussion and development with the pilot villages. The statutes included electing a village land caretaker committee (including women members) and stipulating

that the general assembly of all households was the decision-making body. While the village land caretaker committee would deal with day-to-day interaction with outsiders and organize the annual lottery for plots in Chin State, any change, for instance, of the internal customary rules for land management had to be adopted by the general assembly, while any lease to an outsider of village land had to be agreed by the village assembly of all listed members of the village organization.

The idea in the research was for the village to make use of the Association Law, 2014 to approach the General Administration Department (GAD) of the Ministry of Home Affairs, show the statutes that would detail the objectives, organizational framework and provide the names of the land tracts in question and request a certificate for it to be considered a local organization or association that owned land in common. A list of members of this organization would be attached as a legal document, while the list of internal customary internal rules would also be attached, but for information only.

In any formalization of customary tenure, the ones who hold the tenure must be known. They constitute a group or an organization. The members of the organization as a legal entity have to be known. This is Ostrom's rule of clear entry and exit rules of the group that holds exclusive rights to manage and use the land concerned. This means that as part of official procedures the names of all families must be recorded and the list attached to the statutes. Such a list would be prepared both in Chin and Shan State and attached to the Statutes. A copy would be kept in the village and with the village cluster or tract administrator. In the Shan villages the internal rules should include a dated list of names and size of claims as well as internal customary rules for inheritance that would cater to the addition of new names to the list as youngsters grow up. In the Chin villages the ancestral prerogatives in certain named *lopil* would be included in the internal customary rules. So far the recorded internal rules do not have such a list and further work needs to be done with the Shan and Chin villages prior to any engagement with the government on customary land registration.

Once GAD has endorsed the request of a village to turn itself into an organization wanting to hold customary land in common, the village would take this GAD certificate to the Settlement and Land Records Department of the MOAI and refer, as mentioned above, to Article 6 of the Farmland Law.

This has never been done before and it would not happen overnight. The researchers had no opportunity to consult in-depth with government departments on the ideas due to the volatile political situation and the LCG's wish to see the Land Policy adopted before any new questions were raised. There is also further work to be done on the draft procedures as the internal management rules in a village need

to be vetted against the statutes to see there is no contradiction. For Shan villages with partitioned common property, the claims of individual families ought to be listed in the internal rules by date and the prerogatives of Chin clans in certain plots included.

The prospect of carrying the process forward is good. At present the NLUP mentions up front in Article 5 that one of the objectives is “to recognize and protect customary land tenure rights and procedures of the ethnic nationalities” and in Article 16 we read a wish for “establishing (a) clear and easy process to enable recognition and registration of rights for all stakeholders including ethnic nationalities and smallholder farmers, when their rights have not previously been recognized and registered”. Finally, in Article 62 we read that “customary land use tenure systems shall be recognized in the National Land Law in order to ensure awareness, compliance and application of traditional land use practices of ethnic nationalities, formal recognition of customary land use rights, protection of these rights and application of readily available impartial dispute resolution mechanisms.”

The draft Land Policy makes a reference to land ‘registration’. This is important as rights in land need to be registered for the state to protect these rights. It is doubtful, though, whether the government has considered in detail how to go about registration of customary and communal tenure. There is therefore ample scope to bring forward ideas with the new NLD government once the NLUP has been endorsed. The present study has outlined the institutional structure for two sets of rules: statutes to turn the village into a legal entity with clear group membership rules and governance structure and secondly the record of existing customary tenure rules in order to allow this to continue and not impose a new order on the village in the process of formalization. The process is not envisaged to create legal institution-shopping and establish new kinds of property rights, which would create uncertainty and conflict. The warning that the positive attributes of a customary system that is local and flexible could be undermined when codified is optimistically counteracted. The internal rules are not codified, but written down as they stand. Only the status of the community as a legal entity is codified with the necessary precautions.

Development of Mapping Procedures for Customary Land Registration

While the social, economic and institutional issues of formalization of customary tenure can be fine tuned to fit the individual villages concerned and be based on existing internal customary rules where these are based on equity and inclusiveness, the mapping is more difficult, if valid boundaries of so-called farmland (in Farmland Law vocabulary) are to be established. The land under shifting cultivation changes

each year and boundaries of land in old fallows under forest cannot be seen and the land use of a particular *lopil* may not be the same this year and ten years later.

By 2016 only around 15% of Myanmar is covered with land titles and only in the lowlands. This fact has led many development partners since 2013 to support mapping projects in pilot sites to build up capacity of government officers. In Myanmar the land administration has worked its land administration and land surveys on the basis of *kwin* maps dating back to 1906 in the British period. *Kwin* maps are maps covering 500 acres within which individual farmers' holdings were plotted. These *kwin* maps are fundamental to the cadastral system, but very many of them are outdated as individual holdings have changed hands and shape. In upland areas there are no *kwin* maps, so any geo-referencing for customary tenure must start anew. None of the development partners have yet supported projects in the uplands among communities practicing customary tenure, so there are no pilot initiatives to show how to go about mapping it.

In order to do a proper cadastral registration of customary tenure, the land parcels that have the village as the right-holder must be surveyed. This means the boundaries of maybe thirty to fifty parcels that make up the joint agricultural land of a village must be surveyed. This has been the procedure in Cambodia, where one indigenous community with proper statutes and recorded internal rules registered a total of 1424.6 ha under communal tenure. Here the land was divided into 6 types of land that include: A: burial forest of 10.02 ha, B: paddy land of 31.74 ha, C: residential land 166.94 ha, D: actual cultivated land of 636.5 ha, E: spirit forest, 5.73 ha, F: reserved land necessary for shifting cultivation, 573.33 ha. From the figure below it is noted that the cadastral index map includes 388 GPS readings. Compared to Chin State with widespread *lopil* throughout the Chin village landscape, the survey of this village in Cambodia would be much easier, but still labor-intensive for surveyors.

Figure 6: Cadastral Index Map of Andong Kralleng Indigenous Community, Cambodia

The same procedures may be used for a cadastral registration of the 1000-1400 acres of a Shan State village with limited change to plots of shifting cultivation. The boundaries of the land tracts put under cultivation would not change the way they might in Chin State. But the Settlement and Land Records Department (SLRD) would still have to develop new land title forms for customary communal land registration and define new adjudication processes. In Cambodia this took years for the Ministry of Land Management, Urban Planning and Construction (MLMUPC). And the cadastral registration in Myanmar would need orthophotos, which may or may not exist for particular upland areas. Development

partners in Myanmar have recently financed the purchase of Rapid Eye satellite images of most of Myanmar, but how this - or the use of drones could be used for customary communal land registration has not yet been clarified, but needs to form part of the future debate on how to protect customary tenure by demarcating it.

It would prove almost impossible in Chin State to survey the 14,000 acres of land a village of 2-300 families who claim to use these in a ten-twelve year rotation of shifting cultivation. In fact, a large Chin village of 300 families, each using a plot of around 3 acres/year would during a ten year period use 9,000 acres - each family thus commanding on average 30 acres. But to identify exactly which 9,000 acres begs the question.

Mapping customary tenure of shifting cultivation land for the sake of registration is therefore an issue. In order to complete the tentative procedures in the research, the LCG hired the company Gmap to carry out mapping of the agricultural land of the pilot villages in Chin and Shan State. It was found that the agricultural land parcels in the Shan village would be amenable to land surveys by, for instance, handheld GPS. However, as can be seen in Figure 7 from the satellite image of just one *lopil* (out of 17 *lopil*), - the *lopil* being defined by dotted yellow lines following the ridges – the land is not fully used in the year concerned as only one-fourth of the land has been cleared and put to cultivation. The same would be the case for a second *lopil* opened up that year. Inside a *lopil* there are also steep slopes and rocks, but more land could have been cleared for cultivation. This means that for each of the 17 *lopil* in a village one cannot be sure precisely what land inside the *lopil* should be surveyed for cadastral land registration. Some years less land is used as young men migrate for periodic labor to Mizoram, India, and less land may also be used by some families, which establish terraces. And more land may be put to cultivation by new families in some years. A further constraint in a cadastral survey would be that all the fallow land that was to be included in the land registration survey - and in particular the boundaries - would be covered by forest in 8-10 year old fallows and therefore impossible for surveyors to see.

Figure 7: Satellite image of annual land use inside one *lopil* in Chin State.

The yellow dotted line defines the *lopil*'s boundaries

Discussion and Conclusion March 2016 on Formalizing Customary Tenure in Myanmar

Since the reform process started in 2012 the focus on customary (communal) tenure among civil society organizations, including the Land Core Group and a number of development partners has been

linked to the risk of alienation, in particular under the VFV Law. Therefore, a number of initiatives on mapping land have started, but no one has yet, though, looked at the different institutional frameworks for registration of customary tenure except the present study funded by the Land Core Group. The study revealed that the communities wanted a customary communal land registration of the agricultural land parcels of the village community, including all the fallow land as well as permanent irrigated rice fields in some instances. Communities were able to articulate most of the internal rules of customary tenure, which ensured access to agricultural land for those living permanently in the communities. There were differences in internal rules between Chin and Shan communities as the land endowment and kinship characteristics were different. The study also revealed that the communities could agree on statutes and governance structures for possible conversion of the community into a legal entity that would hold the titles of all the warranted land parcels jointly.

This wish by the communities is in contrast to the widespread recommendation of a number of economists who have advocated for individual land registration to support economic investment and an emergent market in land. In favor of the communities, other economists argue that for communities practicing customary communal tenure such individual land registration would create its own externalities in terms of social conflict (Fitzpatrick 2006). Fitzpatrick holds that “Because these close-knit communities tend to create norms that maximize net social welfare within the community, their resource governance rules and cooperative processes often provide relatively efficient means to internalize externalities” (Fitzpatrick 2006:1011), these externalities meaning, for example, the impact of the market and internal environmental resource depletion.

Fitzpatrick holds that these communities can deal with internalization functions at relatively low cost compared to state law and legal institutions. However, the present study still advocates that the state law and legal framework should be used to combat the risk of alienation from land concessions. This means that the customary land tenure must be registered legally in order to have state protection, but at the same time such formalization of customary tenure must not put a straitjacket on the flexibility inherent in customary tenure. The present study believes that the recording and the writing down of the existing customary internal rules and seeing these as the basis for land management, the flexibility of customary tenure can be preserved. The statutes will stipulate the need for the village general assembly, if the internal rules are to be changed. It would no doubt be a layering of formal institutions on informal arrangements, but only as a protective shell, not to interfere with the customary arrangements.

It is believed that if there is political will the whole adjudication process and institutional arrangements for registration of customary tenure in land administration can be worked out over the next

couple of years in consultation with communities, government and civil society. The survey and mapping land parcels of the Shan pilot villages may be done by handheld GPS as in the Cambodia example. However, the methods of mapping and surveying, need technical advice, especially if we include the large shifting cultivation areas of many upland communities, then the mapping of the land of customary tenure remains unresolved and calls for additional research and pilots.

The establishment of boundaries of the parcels under customary tenure in the shifting cultivation landscape of Chin villages in the Northern Chin State is difficult as boundaries of the land put to cultivation are fuzzy. The outside boundaries of the rotational farmland of a number of *lopil* may enclose more than 12,000 acres and the attitude of the central government to allow village registration of this amount of land is not known and it might not all need to be measured if other protection measures were put in place. An examination of, for instance, the Papua New Guinea *Land Groups Incorporation Act* 1974 and the South Africa *Communal Property Associations Act*, 1996 fails to show how the specific land parcels under customary tenure in these countries will be measured. Presumably the Papua New Guinea land parcels would include shifting cultivation. In the Chin State, in circumstances where more families construct terraces and establish orchards, they may have less need for shifting cultivation land. But if more families moved in due to landslides elsewhere in Chin State – as occurred in 2015 - more land would be put to cultivation within *lopils*.

For the Chin communities in Northern Chin State the immediate goal would be to define the outside boundaries of land in their permanent control. This would be important if the village wanted to rent out part of its shifting cultivation land to an outsider - for example for *mithan* grazing or for pine resin extraction. In this case the village needs to be sure of its ownership to enter a contract and reap the monetary benefit for the community. Some studies operate with the concept of a ‘tenure shell’ to guarantee tenure primacy within this defined territory (USAID 2012). Such a shell may be supervised and endorsed by local authorities and the Farmland Administration Boards (FAB) set up at village cluster level as the lowest level of a hierarchy of FAB under the Farmland Law, 2012. If locally-tailored procedures can be established with the endorsement of local authorities, including ethnic state-level chief ministers, and if the statutes can constitute a legal shell within which the customary system of internal rules operates, local authorities can define minimum standards to which customary systems must conform. These may constitute the enabling conditions for a gradual development of more fitting procedures, which in the long run could also cater to a possible change of the configuration of rights inside shifting cultivation areas as households establish private tea gardens, orchards or rice terraces.

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Figure 1: Farmers from Shan State hold a press conference at Taunggyi Catholic Church memorial hall in southern Shan State on January 3, 2016, to protest against unfair treatment when trying to reclaim their confiscated land. Photo: Htet Htet/Mizzima

<http://mizzima.com/news-domestic/land-confiscation-problems-worsen>



Figure 2: Over the past few years, farmers across the country have begun demanding the return of their land from the Burmese Army by staging “plough protests”. (PHOTO: Han Win Aung)

<http://english.dvb.no/news/farmers-sentenced-8-months-for-mandalay-plough-protest-burma-myanmar/43376>



Figure 3: A *lopil* of 200-300 acres in Northern Chin State (Photo by author)



Figure 4: Preparing sketch maps of land use and land rights, Chin State (Photo by author)



Figure 7: Satellite imagery of cultivated areas inside a *lopil* that is demarcated by yellow dotted lines (prepared by Gmap, Yangon, Myanmar 2014)

